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No. 07-1466

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In The

Supreme Court of the United States

SANDRA BRITTON, ET AL.,

Petitioners,

v.

BAYER CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BAILEY PETITIONERS' REPLY BRIEF

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ARGUMENT

According to the respondents, evidence that something was sent negates uncontroverted evidence that it was never received, and a court's accurate recitation of a standard will suffice even if the court applied it incorrectly. In what Judge O'Scannlain referred to as the "universe of due process,"[1] those notions are untenable. Due process requires a more logical, more discriminating approach. It has to, because it is "concerned with . . . prejudicial infringement of substantial rights." *North Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 85 (9th Cir.), *cert. denied*, 310 U.S. 632 (1940).

In seeking to avoid review, the respondents rely on essentially two arguments: this case presents an issue of fact and so does not merit the Court's attention, and the key documents were transmitted to the Bailey Petitioners' counsel. As will be shown below, neither of those contentions should dissuade the Court from granting the Bailey Petitioners' petition for writ of certiorari and reversing the Ninth Circuit's judgment.

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[1] *United States v. Young*, 458 F.3d 998, 1005 (9th Cir. 2006).

I. THIS CASE DOES NOT INVOLVE AN ISSUE OF FACT, BUT EVEN IF IT DID, THE COURT STILL SHOULD GRANT REVIEW.

The respondents assert that this case involves an issue of fact – "whether or not Petitioners received" the documents at issue. Brief in Opposition at 3; *see* Brief in Opposition at 7-11. However, they fail to cite any evidence that the petitioners actually received the documents. In fact, all of the evidence regarding receipt shows that they did not. Obviously, when the evidence on a particular matter is entirely one-sided, there is no issue of fact.

Furthermore, this Court's rules specifically allow for the granting of a petition for writ of certiorari when the asserted error consists of incorrect fact findings. Sup. Ct. R. 10. To be sure, this Court has said that such petitions will be "rarely" granted, *id.*, but as Webster will attest, "rare" is a relative term. Even a small sampling of this Court's jurisprudence shows numerous instances in which the Court decided very fact-specific, fact-intensive cases.

For example, in *Florida v. Riley,* 488 U.S. 445 (1989), the Court held that aerial observation from a helicopter hovering at 400 feet does not violate any reasonable expectation of privacy (though helicopter observation from a lower altitude might). In *Perry v. Leeke,* 488 U.S. 272 (1989), the Court concluded that the right to counsel was not violated when a judge separated a defendant from his attorney during a 15-minute recess after the defendant's testimony on

direct examination (though a lengthier separation may well have). In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court addressed laws requiring that certain information be furnished to a woman by a physician or his or her assistant, carefully distinguishing laws requiring that such information be furnished by the physician exclusively. And in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court held that a "release time" program allowing public-school students to receive religious instruction during school hours but specifically off-campus did not violate the Establishment Clause.

Considering such examples, it is no surprise that members of the Court have indicated that sometimes fact-specific cases warrant review. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("The relative question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful . . . ") (Scalia, J., writing for the majority); *United States v. Gagnon*, 470 U.S. 522, 530, 531 (1985) (Brennan, J., joined by Marshall, J., dissenting) (observing that the case decided by the Court contained "odd facts" and had a "highly fact-specific nature"). As Justice Blackmun observed, "the process of constitutional adjudication itself [ ] is often highly fact specific[.]" *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 550 (1989) (Blackmun, J., joined by Brennan, J., and Marshall, J., concurring in part and dissenting in part).

History disproves the respondents' theory that the Court automatically rejects fact-intensive cases. On the contrary, the window created by Supreme Court Rule 10 is more than wide enough for this case to fit through. The Ninth Circuit's decision strays so far from the core values of due process – in the venerable words of *LaChance v. Erickson*, 522 U.S. 262, 266 (1998), "the right to notice and a meaningful opportunity to be heard" – that even if an issue of fact were involved here, it should not preclude review.

II. THE ATTEMPTS TO PROVIDE NOTICE IN THIS CASE DID NOT SATISFY DUE PROCESS.

A. Sent But Not Received

The respondents' Brief in Opposition features a veritable parade of declarations that the key documents in this case were sent to the Bailey Petitioners:

- "Lance Palmer . . . forwarded to Petitioners' counsel a copy of CMO 15 and 15A. . . ." Brief in Opposition at 5.
- "Defense counsel also mailed a copy of CMO 15 to Petitioners' counsel. . . ." Brief in Opposition at 5.
- "Plaintiffs' Liaison Counsel forwarded a copy of this Minute Order to Petitioners' counsel. . . ." Brief in Opposition at 5.
- "Plaintiffs' Liaison Counsel forwarded a copy of this order to Petitioners' counsel. . . ." Brief in Opposition at 5.

- "The first proposed order was e-mailed to Mr. Catouche Body . . . " Brief in Opposition at 5.
- "[T]he second proposed order was served on Mr. Funches at Funches & Associates. . . ." Brief in Opposition at 5.
- "Petitioners' attorneys were sent the district court's orders. . . ." Brief in Opposition at 8.
- "[A]ll CMOs were served upon Petitioners . . . " Brief in Opposition at 12.
- "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches . . . all of the district court's CMOs and orders . . . " Brief in Opposition at 12.
- "Plaintiffs' Liaison Counsel . . . mailed to Petitioners' counsel [ ] CMO 15 and 15A. . . ." Brief in Opposition at 12.
- "Defense counsel also mailed the letter to Mr. Funches, along with a copy of CMO 15 . . . " Brief in Opposition at 13.
- "[T]he certificate of service . . . demonstrated that Mr. Funches was properly served with a copy of [CMO 15]. . . ." Brief in Opposition at 13.
- "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches at the correct address a copy of CMO 15. . . ." Brief in Opposition at 14.

- "[T]he certificate of service . . . indicates that Mr. Funches was properly served with [CMO 15] . . . " Brief in Opposition at 14.
- "Petitioners were mailed numerous documents, including the district court's orders . . . " Brief in Opposition at 16.
- "[T]he mailing of all of these documents to Mr. Funches . . . satisf[ied] due process. . . ." Brief in Opposition at 16.
- "Petitioners were properly mailed copies of all of the district court's CMOs . . . " Brief in Opposition at 17 n.4.

Significantly, however, the number of statements that the Bailey Petitioners actually *received* the key documents – as due process required in this case – is considerably fewer. Even then, most of the respondents' proclamations of receipt are not based on the record, but are instead deftly hidden behind the district court's dubious findings:

- "The district court also determined that the Petitioners' attorneys were receiving documents . . . " Brief in Opposition at 6.
- "[T]he district court found the Petitioners' counsel actually received documents from the court . . . " Brief in Opposition at 6.
- "The district court properly determined that Petitioners' attorneys were in fact

receiving documents from the court . . . " Brief in Opposition at 12.

- "[T]he evidence established – as properly concluded by the district court – that Petitioners' counsel did receive the appropriate documents. . . ." Brief in Opposition at 14.

- "As properly determined by the district court . . . Petitioners received documents sufficient to provide notice of the CMOs . . . " Brief in Opposition at 15.

A review of the record shows that there is certainly evidence of sending, but none whatsoever of receiving. For example, the respondents rely on the affidavit of Plaintiffs' Liaison Counsel Lance Palmer. Brief in Opposition at 12-14. But essentially, Mr. Palmer's affidavit states that he always forwarded CMOs, other orders, and other relevant documents to Catouche Body and Delano Funches. In other words, Mr. Palmer's affidavit shows that he did his job and sent the documents he was supposed to send. But noticeably absent from Mr. Palmer's affidavit is any mention of green cards, fax confirmation sheets, or other any other evidence of actual *receipt*.

Mr. Palmer testified that he stuck to the routine which he was supposed to follow. But his generic affidavit does not and cannot counter the specific testimony of Mr. Funches and Mr. Body, who testified that the relevant CMOs and other orders were not, in fact, received.

Their evidence is uncontroverted; yet the Ninth Circuit dismissed it. Due process demanded that it not. As one court remarked, "surely truth is considered important for due process." *Douglas v. Marino*, 684 F. Supp. 395, 399 (D.N.J. 1988).

B. No Evidence

The rest of the respondents' suggestions regarding receipt are similarly infirm. They say that "Petitioners do not explain how a number of petitioners complied with a different CMO by filling out and serving plaintiff fact sheets if they never received any documents from the court." Brief in Opposition at 14. The Bailey Petitioners have never claimed that they received *no* documents from the court. But the record conclusively shows that they did not receive the most important ones.

The respondents also hint that the Bailey Petitioners could have learned that their case had been dismissed (without notice from the district court) because the information was available on the court's electronic docket via the internet. *See* Brief in Opposition at 14. Under that argument, a court could stop sending out notices altogether (or keep sending them to the wrong address). So much for the "notice" in "notice and a hearing."[2]

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[2] When the Bailey Petitioners' appeal reached the Ninth Circuit, the Ninth Circuit's Clerk contacted the O'Quinn Law Firm and informed them that Catouche Body was *still* designated as

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The respondents similarly assert that "proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." Brief in Opposition at 16 (quoting *Hagner v. United States*, 285 U.S. 427, 430 (1932)). Mail intended for the Bailey Petitioners' counsel but sent to the home of Mr. Body's grandmother was hardly "properly directed." Furthermore, an *irrebuttable* presumption that mail sent is actually received violates due process; only a rebuttable presumption is acceptable. *United States v. Simmons*, 476 F.2d 33, 36-37 (9th Cir. 1973); *United States v. Bowen*, 414 F.2d 1268, 1273 (3d Cir. 1969). The affidavits of Mr. Funches and Mr. Body thoroughly rebut the presumption here.[3]

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lead counsel and that the error must be corrected. Despite the Bailey Petitioners' best efforts to correct the docket sheet error listing Catouche Body as the lead attorney by removing him and specifying Dana Morris and Christian Steed of the O'Quinn Law Firm as lead attorneys, and despite the fact that the district court granted the petitioners' Motion to Substitute Attorney and Designate Lead Counsel, the district court's docket report still listed Catouche Body as lead attorney to be noticed. Amazingly, the docket report also still listed Mr. Body's grandmother's address as the address for the lead attorney to be noticed.

[3] The respondents say that "the Ninth Circuit has held that to rebut this presumption, something more than a declaration of non-receipt is required" (Brief in Opposition at 16), but never address the Bailey Petitioners' evidence. That evidence offers far more than a mere "declaration of non-receipt." For example, Mr. Funches' affidavit states in relevant part:

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The respondents likewise say that "Petitioners or their counsel failed to make any efforts to remain apprised of their case." Brief in Opposition at 14. The respondents do not mention that there were communications between the parties *after the suit had been dismissed* that would lead a reasonable person to believe that the case was still pending. For example, in letters dated May 26, 2004, June 1, 2004, June 15, 2004, and June 23, 2004 – each one after the lawsuit had already been dismissed – the respondents provided information to the Bailey Petitioners as if the case had not been dismissed at all.

The District Court's docket sheet in the Britton case lists Catouche Body as the lead attorney to be noticed. This is incorrect. . . . I have at all times been the lead attorney for the plaintiffs in the Britton case. . . . During that time, I have never spoken with Lance Palmer, Plaintiffs' Liaison Counsel.

A certificate of service was filed on December 8, 2003, separate from but in reference to the Second [Proposed] Order of Dismissal With Prejudice For Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A. Though my name appears on the certificate of service, I never received a copy of Defendants' [Proposed] Order of Dismissal With Prejudice For Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A. In other words, the Britton case was dismissed based on this pleading and a series of orders which I never received. Had I received the CMO and court order, I would have acted in a timely manner so as to be in compliance with any and all mandates of the Court.

Last, the respondents' reliance on *Herndon v. De la Cruz* (*In re De la Cruz*), 176 B.R. 19 (B.A.P. 9th Cir. 1994) (Brief in Opposition at 16), deserves comment because that case highlights the very error that was made here. In *De la Cruz*, "[t]here [wa]s no deprivation of Due Process since [the creditor] had *actual notice* of the Chapter 7 case and had sufficient time to file a complaint to determine dischargeability[.]" *Id.* at 24 (emphasis added). Due process required actual notice here, as well, where the stakes were substantially higher.

In sum: Certainly, there is evidence that the key documents were sent to the Bailey Petitioners. But there is no evidence that the Bailey Petitioners actually received them, and there is abundant, uncontradicted evidence that they did not.

CONCLUSION

Did the Bailey Petitioners receive, as due process requires, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections" (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) in regard to the CMOs, the motion to dismiss, and the order of dismissal that terminated their lawsuit? This Court's jurisprudence says no. Because the Ninth Circuit said yes, the Bailey Petitioners respectfully

ask the Court to grant their petition for writ of certiorari.

Respectfully submitted,

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